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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1494

JULIUS W. HOBSON, TINA C. HOBSON, THE DC STATEHOOD PARTY, CHARLES I. CASSELL, REV. JOE L. GIPSON, WARREN MORSE, BETTIE RANDALL, REV. WILLIAM WENDT, SAMMIE A. ABBOTT, DR. DAVID A. DABNEY, ETTA HORN, LORENZO J. NEAL, and WILLIAM SCHEIRER, *Petitioners*

vs.

BOARD OF ELECTIONS FOR THE DISTRICT OF COLUMBIA, J. E. BINDEMAN, ROBERT E. MARTIN, CHARLES B. FISHER, CIVIL SERVICE COMMISSION, ROBERT E. HAMPTON, JAMES E. JOHNSON, and L. J. ANDOLSEK, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Julius W. Hobson, *et al.* respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 11, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, was embraced in its order of dismissal which is set forth in the appendix hereto. The United States District Court for the District of Columbia rendered no opinion when it dismissed the complant.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March, 11, 1971. No petition for . hearing was filed. This petition for certiorari is filed within ninety days from the date of judgment in the Court of Appeals. This court's jurisdiction is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

1. The D. C. Delegate Act establishes that "the people of the District of Columbia shall be represented in the House of Representatives." Their Representative, called a "Delegate," is granted "a seat in the House of Representatives" with all the rights, privileges and immunities "granted a Representative by Section 6 of Article I of the Constitution," except one: the right to vote. The questions are:

a. Is Section 202(a) of such act unconstitutional and void to the extent of the attempted restriction on the right to vote?

b. Is Section 202(b) of such act unconstitutional to the extent that it lays down conditions for holding the office of Representative to Congress from the People of the District of Columbia in addition to those qualifications set forth in Article I, Section 2.

c. May the Board of Elections be enjoined from conducting elections for a "non-voting" Representative and required to conduct a regular Congressional election?

2. Are burdens placed on the electoral process by the D. C. Election Law which are unsupported by a compelling governmental interest? Particularly,

a. Do these burdens operate to disadvantage new political parties such as petitioner D. C. Statehood Party and favor the two old established national parties, even though at least one of them is clearly a minority party in the District of Columbia?

b. Should the legality of these burdens be examined separately or is their cumulative effect the determinative factor?

3. Does the Hatch Act by excluding more than half the voting population of the District of Columbia from participation in the election campaign, even to the point of preventing them from circulating nominating petitions,

a. Violate the constitutional rights of the voters of the District of Columbia?

b. Multiply advantages granted established political parties by the D. C. Election Law?

STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of three major Acts of Congress affecting elections in the District of Columbia:

The District of Columbia Delegate Act, September 22, 1970, P. L. 91-405, 84 Stat. 848,

The District of Columbia Election Law, August 12, 1955, ch. 862, 69 Stat. 699 as amended October 4, 1961, P. L. 87-389, 75 Stat. 817; April 22, 1968, P. L. 90-292, 82 Stat. 103, and the said District of Columbia Delegate Act of September 22, 1970, P. L. 91-405, Secs. 203 and 205 of Title II, 84 Stat. 849.

The Hatch Political Activities Act, Sections 7324, 7326 and 7327 of Title 5, United States Code; August 2, 1939, 53 Stat. 1147; July 14, 1940, 54 Stat. 767; September 6, 1966, P. L. 89-554, 80 Stat. 525.

The text of relevant portions of these statutes is set forth in the appendix to this petition.

The principal constitutional provisions involved are these:

Article I, Section 2: The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of the State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers. . . .

[modified by Fourteenth Amendment]

Article I, Section 8, clause 17: The Congress shall have Power... To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts,

Magazines, Arsenals, dock-Yards, and other needful Buildings;...

Article IV, Section 3: New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Also the First, Fifth, Ninth, Fourteenth and Twenty-Third Amendments.

STATEMENT OF THE CASE

November 10, 1970 some of the present petitioners filed a complaint against the Board of Elections attacking the constitutionality of certain aspects of the D. C. Election Law as amended by the D. C. Delegate Act, enacted September 22, 1970. A temporary restraining order and preliminary injunction were denied November 12, 1970. However, at the invitation of the court, an amended complaint was filed by all present petitioners December 21, 1970 raising additional constitutional issues respecting the D. C. Election Law and questioning the non-voting status of the District of Columbia Representative to Congress under the D. C. Delegate Act. Petitioners also challenged the constitutionality of the Hatch Act as applied to D. C. elections and joined the Civil Service Commission as defendants.

The plaintiffs, petitioners here, were registered and qualified voters in the District of Columbia.

One, Julius W. Hobson, had been asked, and has since agreed, to run for Congress as a candidate of the D. C. Statehood Party. However, it was alleged, "burdens and restrictions imposed upon such office and candidacy by the Delegate Act, the Election Law, and the Hatch Act, and the resulting discrimination against the voters of the District of Columbia, have infringed upon plaintiff Hobson's right to pursue such office and the rights of the other plaintiff-voters to elect a Representative to Congress."

The D. C. Statehood Party, also named as a plaintiff, was described as "a newly formed political party which seeks admission of the District of Columbia as a constituent state of the United States of America. To this end it desires to: (1) take those steps historically necessary to secure statehood, including the principal first step of a referendum to ascertain whether a majority of the electorate of the District of Columbia desires statehood; (2) nominate candidates of its choice for election by the voters of the District of Columbia to the offices of President and Vice-President of the United States, Senator and Congressman as well as local officials, legislators, and judges; (3) conduct party elections to nominate candidates for such offices and select party officials; and (4) remove all barriers to full and fair participation by voters in the electoral process in the District of Columbia."

Other plaintiffs included (A) a *Maryland voter* who claimed his "(1) right not to have the House of Representatives of the United States diluted by the presence of unconstitional officers and (2) his right to vote for a Representative to an integral House of Representatives is abridged and infringed by the District of Columbia 'Delegate' Act;" (B) *Federal employees* who "have been discouraged

from participating in District of Columbia election campaigns by reason of said employment;" (C) *Announced candidates* for the Democratic Party Congressional nomination who "were unable to qualify by reason of the burdensome restrictions imposed on their candidacy by the Delegate Act, the Election Law and the Hatch Act" and announced candidates for the Republican Party nomination who were unable to qualify for the same reason

These parties requested the court to (a) enter a declaratory judgment holding the qualifying phrase in Section 202(a) of the D. C. Delegate Act, "but not to vote," unconstitutional and void and (b) direct the Board of Elections to cease conducting elections for a non-voting delegate and to submit plans for conducting elections for a Member or Members of the House of Representatives chosen by the People of the District of Columbia in accordance with Article I, Section 2 of the Constitution.

The court was also requested to (c) enter a declaratory judgment holding the qualifications in Section 202(b) of the D. C. Delegate Act unconstitutional and void, and (d) direct the Board of Elections to so announce to prospective candidates and to refrain from disqualifying and candidate on the basis of qualifications other than those specified in Article I, Section 2, clause 2 of the Constitution; and (e) lift various other specified restrictions on parties, candidates and voters in forthcoming elections.

January 6, 1971 the District judge denied a renewed motion for temporary restraining order and dismissed the complaint. The Court of Appeals denied emergency motions the same day. After an expedited hearing on February 22, 1971, the Court of Appeals on March 11, 1971, affirmed the dismissal "insofar as it relates to (a) the nonvoting status of the officer provided by the District of Columbia Delegate Act and (b) the various statutory provisions bearing upon the

manner of his selection... by reason of the insubstantiality of the [constitutional] questions raised," but vacated and remanded the judgment insofar as it "involves the challenge by appellants to the party qualifying provisions for the Presidential election contained in Section 8(f) of the District of Columbia Election Act." With respect to this latter point, the District court was directed to determine "whether the constitutional issues are sufficiently ripe for resolution at this time at the instance of these appellants as to warrant the convening of a three judge court." No opinion was to be intimated as to the merits of this question, the court added.

REASONS FOR GRANTING THE WRIT

This case involves (1) the right of the People of the District of Columbia to voting representation in Congress and (2) the integrity of the method of conducting elections here. Both of these issues raise constitutional questions of exceptional importance to the People of the District of Columbia and to the nation at large.

1. Denial of Vote to Congressional Representative of People of District of Columbia.

The right of the People of the District of Columbia to voting representation in Congress is a matter of first impression. The authorities cited by the Court of Appeals do not purport to rule on this question[1]. Until *Baker v. Carr*, 369 US 186 (1962), *Wesberry v. Sanders*, 376 US 1, (1964), *Bond v. Floyd*, 385 US 116 (1966), and *Powell v. McCormack*, 395 US 486, (1969), Congressional voting rights cases like this could not be litigated.

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[1] *Loughborough v. Blake*, 5 Wheat 317 (1820), the Court ruled that the constitution "confers on Congress the power of taxing the district and

Even if there were strong dicta supporting the denial of Congressional representation to the People of the District of Columbia–and there is not–it is manifestly unfair to foreclose judical inquiry on that basis since, while this dicta was written about them, the People of the District of Columbia had no way of litigating their voting rights directly.

The Right to Congressional Representation under Article I, Section 2 distinguished from the right to deny "home rule" under Article I, Section 8, clause 17.

It is important to distinguish at the outset, two entirely separate and distinct voting rights issues in the District of Columbia. The one involved here is the right of the People of

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territories as well as the states," and that the power to tax is not dependent on the right of representation, for otherwise "whence is derived the right to lay and collect duties, imports and excises?" (p. 322-324). The often quoted dicta begins by acknowledging the anomaly of denying representation: "Although, in theory, it might be more congenial to the spirit of our institutions, to admit a represenative from the district, it may be doubted, whether in fact, its interests would be rendered thereby the more secure; and certainly, the constitution does not consider their want of a representative in congress as exempting it from equal taxation." This is a long way from approving the denial of the right to vote. See discussion and distinction of Loughborough case in *Downes v. Bidwell*, 182 US 244, 259-261 (1901).*Heald v. District of Columbia*, 259 US 114 (1922) merely reaffirmed the taxation without representation principle as did the more resent *Breakfield v. District of Columbia* – US App. DC –, No. 23, 456 decided August 7, 1970 where this court resently denied certiorari. *Carliner v. D.C.*, 134 US App. D.C. 43, 412 F2d. 1090 (1969) and *Hobson v. Gasch*, cert. denied 386 US 914 (1967) are both cases questioning local government legislation because the people do not vote for local officials. Again, this is not only a different question, but a question that arises, like the tax cases, in a dependent procedural posture; that is, a ruling on the right to vote cannot be reached in such case unless the court first decides that the right to tax or to legislate is dependent on the right to vote. No court has ever so held.

the District of Columbia to be represented in Congress by reason of the rights granted them under Article I, Section 2 of the Constitution. This issue of Congressional representation is, and has been throughout the years, a completely separate one from the so-called "home rule" or local self-government issue. The "home rule" issue centers on a different provision of the Constitution, Article I, Section 8, clause 17, which gives Congress exclusive jurisdiction over the District. Much in the cases cited by the Court of Appeals had to do with this latter "home rule" issue.

There is no issue in this case about the fact that Congress has exclusive jurisdiction over the District; that it is the only sovereign here; and that this is "national" territory. Whatever evil we think it is to deny local self-government to the People of the District, that issue is not involved here.

To say that Congress has exclusive jurisdiction is to say that no one else has it; that sovereignty over the District of Columbia lies in all the people of the United States and not simply those people who reside here. But to say that Congress is your sovereign is a far cry from saying you have no right to be represented in your sovereign's legislature. In fact, the point that Congress is your sovereign makes it all the more important to be represented there.

Article I, Section 8, clause 17 has nothing whatsoever to do with denying Congressional representation to the People of the District of Columbia. There is no conflict between clause 17 and Article I, Section 2. Constance McLaughlin Green in the first volume of her definite history of the District of Columbia, *Washington, Village and Capital, 1800-1878*, Princeton University Press, 1962, at page 11, says:

"In accepting the principle eventually written into the Constitution, that Congress must be supreme in the federal

district, no one had equated sacrifice of state power with cancellation of political rights of citizens of the future federal territory. On the contrary, Americans of the 1870's had taken for granted that permanent residents, like citizens of any state, would "enjoy the privilege of trial by jury and of being governed by laws made by representatives of their own election." Madison, to be sure, had recognized the puzzling character of the problem in a country where all political machinery operated through state organizations and only citizenship in a state enabled a man to vote in national elections. In 1783 the Virginian had noted merely that "the power of Government within the sd district [should be] concerted between Congress and the inhabitants thereof." Four years later he had gone further. In one of the Federalist papers, that collection of able essays urging adoption of the Constitution, he had declared the political status of citizens of a federal district amply protected, "as they will have had their voice in the election of the government which is to exercise authority over them; [and] as a municpal legislature for local purposes, derived from their own suffrages, will of course be allowed them" If the phrase "they will have had their voice" implied they could not continue to have it, few contemporaries had observed the nuance." [footnotes omitted]

This view of the 1780's was recently echoed by this Court in its 1970 decision in *Evans v. Cornman*, 398 US 419, where it was held that a cession by Maryland to the United States of exclusive jurisdiction under Article I, Section 8, clause 17 could not operate to deprive residents of such areas of their right to vote in federal and local elections. The court said:

"NIH, a medical research facility owned and operated by the United States Government, is one of the places subject to that congressional power.[2] The facility commenced

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[2](Counsel's footnote) This is expressly defined by the Constitution to mean "like Authority" as Congress exercises over the District of Columbia. See full text under "Statutory Provisions Involved," supra.

operation more than 30 years ago, when land was purchased and residential buildings were built to allow scientists and doctors to live near their work. It did not become a federal reservation, however, until 1953 when the State of Maryland ceded jurisdiction over the property to the United States...

"...Appellees...are not residents of Maryland only if the NIH grounds ceased to be a part of Maryland when the enclave was created. However, that "fiction of a state within a state" was specifically rejected by this Court in Howard v. Commissioners of Louisville, 344 US 624, 627 (1953), and it cannot be resurrected here to deny appellees the right to vote...."

There are, of course, some practical distinctions to be made between the situation of the people resident on the grounds of the National Institutes of Health and those resident in the District of Columbia. But as the court in *Evans v. Cornman* said in a different context, "These differences, along with whatever others may exist, do not come close to establishing that degree of disinterest in electoral decisions that might justify a total exclusion from the franchise." In federal elections, District residents "have a stake equal to that of other Maryland residents," and "they are entitled under the Fourteenth Amendment to protect that stake by exercising the equal right to vote."

Rights of "People of the several States" to representation in Congress distinguished from denial of such right to residents of territories never part of a state.

People in the District of Columbia were voting in Maryland Congressional elections before the act of cession became effective in 1800.

As Miss Green points out, pages 23-24:

"Every free resident of the District of Columbia looked forward to November 17, 1800, the date set for the first meeting of the "Grand Council of the Nation" in the new capital. On November 11, voters from Washington journeyed to Bladensburg, Maryland, to cast their ballots in the national election; Georgetowners and Alexandrians voted in their own cities.

"...President Adams' message on the state of the Union seemed to hold out encouragement and to endow Washington with dignity: 'In this city may . . . self-government which adorned the great character whose name it bears be forever held in veneration....'

"Yet the bill presented to the House in December came as a shock to Washingtonians: the powers of the corporations of Alexandria and Georgetown and of all other incorporated bodies in the District were to remain unimpaired, the President was to have authority to replace with his own appointees the incumbents of state executive and judicial offices within the District, but residents of Washington were to have no self-government. . . . Still worse from local citizens' point of view, the bill ignored their rights to vote in national elections and have representation in Congress.

"Protests sounded immediately..."

The historical practice of creating "nonvoting" delegates to the House of Represenatives from territories developed out of the circumstance that under Article I, Section 2 of the Constitution only "the People of the several States" could chose a Representative to Congress. Therefore, territories which were never part of the Union could not constitutionally be permitted a seat in Congress.

"The People of the District of Columbia", on the other hand were at the time of cession, and remain, "People of the several States." It is "important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession," *O'Donaghue v. U.S.*, 289 US 516, 540 (1933). The superior constitutional rights of the People of the District of Columbia have always been distinguished from those accorded residents of the territories, *Downes v. Bidwell*, 182 US 244, 260-261 (1901), comparing the District of Columbia with Puerto Rico which has now had a "nonvoting" delegate for some time.

Therefore, even if it were possible—and the point has never been decided—to create a nonvoting delegate in Congress for territories whose people were never "People of the several States," the situation was and is quite the opposite for "The People of the District of Columbia." The "Constitution attached to [them] irrevocably. There are steps which can never be taken backward," *Downes v. Bidwell, supra.* No one ever consented to withdrawing any Consitutional rights which "The People of the District of Columbia" enjoyed as "People of the several States." Interpreting this phrase in the leading Congressional voting rights case of *Wesberry v. Sanders*, 376 US 1, 17-18, (1964), the Supreme Court said:

"Article I, Section 2, of the Constitution...provides that Representatives shall be chosen 'by the People of the several States' and 'shall be apportioned among the several States...according to their respective Numbers.' It is not surprising that our Court has held that this Article gives persons qualified to vote a constitutional right to vote and to have their vote counted...No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right

to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right..."

Why people of the District of Columbia have been denied representation in Congress

The quick but accurate answer to this question is "black voters."[3] Here as elsewhere in the United States, the existence of substantial numbers of potential black voters has been the principal cause of extensive denial of voting rights. There have, of course, been a number of involved and obtuse legal theories advanced in justification of this denial, as there have in other parts of the United States. But the real reason is not legal. It is racial. It is the same old reason that has been involved in statehood and representation quarrels since earliest days; since the Missouri Compromise of 1819, since the Compromise of 1850 (which in the course of admitting California ended the slave trade in the District of Columbia); since the Kansas-Nebraska Act of 1853; since the Civil War, and since Reconstruction times.

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3 James H. Whyte, *The Uncivil War, Washington During the Reconstruction*, New York, Twayne Publishers, 1958; Theodore W. Noyes, *Our National Capital and Its Un-Americanized Americans*, Washington, Judd & Detweiler, 1951; W. B. Bryan, *History of the National Capital*, New York, MacMillan, 1914, 2 volumes; Derthick, Martha, *City politics in Washington, D.C.*, Joint Center for Urban Studies, Mass. Institute for Technology and Harvard University, Cambridge, Mass., 1961; Green, Constance McLaughlin, *Washington* (In two volumes); volume I, *Village and Capital, 1800-1878;* volume II, *Capital City 1879-1950*, Princeton University Press, 1962-1963.

Miss Green reports, for example, at page 296-297 of her work: "Washington's city council knew in the autumn of 1865 that a bill proposing Negro suffrage in city elections would come before the 39th Congress as soon as it convened in December. In November a committee of the common council had drafted a statement of the city's official view:

'The White man, being the superior race, must...rule the black...Why he is black and we white, or why we the superior and he the inferior race are matters past our comprehension. It, then, becomes a civil as well as a Christian duty. [etc.]..."

Much the same thing was happening a hundred years later, only the language was not so clear. *Congressional Quarterly*, August 18, 1967, pp. 1583-1584, reporting on proposed legislation to give the District of Columbia full representation in Congress with two Senators and the number of representatives it would be entitled to if it were a state, recalled:

"Congress in 1960 cleared the 23rd Amendment, giving District citizens the right to vote in Presidential elections, but provision for a nonvoting delegate in the House was deleted in order to expedite ratification. Most of the opposition to the D. C. Suffrage amendment came from the South and was apparently motivated by the race issue, since the District's population was predominantly Negro. Not a single state of the deep South was among the ratifying states...The proposed Amendment was ratified in 286 days following its submission to the states, more rapidly than any other amendment except the 12th in 1804, which modified the procedure for electing the President and Vice president."

Voting representation in Congress for the People of the District of Columbia has been considered at least twenty times since 1800. While it has frequently received Committee approval, it has never been voted on.

October 24, 1967, the House Judiciary Committee reported out a resolution (House Report 819) which allowed full representation for the District of Columbia, two Senators and the number of Representatives to which it would be entitled if it were a State, but the 90th Congress adjourned before any further action could be taken.

That the right of the People of the District of Columbia to be represented in Congress has been denied for so many years is no ground for continuing the injustice. "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date." *Powell v. McCormack*, 395 US 486, 546-547.

Furthermore, throughout most of the period this right has been denied there has been no effective remedy. For a large part of this history the Fourteenth Amendment's Equal Protection Clause was not in force, *Evans v. Cornman*, *supra*, and its applicability to the District of Columbia through the Due Process clause of the Fifth Amendment was not established until the Supreme Court decision in *Bolling v. Sharpe*, 340 US 497 (1954). Declaratory relief, a crucial remedy in this delicate area, was first available to federal courts in 1934, *Powell v. McCormack*, 395 US 486, 498-499.[4] Furthermore, until *Baker v. Carr*, 369 US 186 (1962) and *Bond v. Floyd*, 385 US 116 (1966) such issues were not generally thought justiciable. These and subsequent cases, however, have placed the right to vote at the very top of the list of rights protected by the courts. "The right to vote is too important in our free society to be stripped of judicial protection," *Wesberry v. Sanders*, 376 US 1, 7 (1964).

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4 As the court said in the Powell case, p. 517-518:
"We need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment, a form

Notwithstanding the immunity of Congress, the courts will enforce the people's right to representation against officials charged with conducting elections, *Wesberry vs. Sanders*, 376 US 1 (1964), and even against Congressional agents, *Powell v. McCormack*, 395 US 486, 503-506, 517-518. In the present case the Election Board should be required to cease conducting an election for a "nonvoting" Delegate and directed to hold elections for representation in Congress free of the nonvoting restriction after entry of a declaratory judgment that such condition is void under Article I, Section 2 of the Constitution, *Wesberry v. Sanders, supra.*

The right of the People of the District of Columbia to be represented in Congress has, up until now, been a sordid game of racial politics. But now that judicial remedies are available, the courts should consider on its merits this important case of first impression involving the most flagrant denial of voting rights ever known in a society which claims a Republican form of government.

2. Burdens on the electoral process unsupported by compelling governmental interest.

The accumulated burdens cast on the electoral process in the District of Columbia by the Election Law are among the heaviest, if not the heaviest, in the entire nation. Such burdens were imposed with full knowledge that election participation in the District of Columbia, as in almost all

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of relief the District Court could have issued. The Declaratory Judgment Act, 28 U.S.C. §2201, provides that a district court may 'declare the rights... of any interested party...whether or not further relief is or could be sought.' The availability of declaratory relief depends on whether there is a live dispute between the parties...and a request for declaratory relief may be considered independently of whether other forms of relief are appropriate."

poor black area of the nation is very low; and at the insistence of those who, as we have already seen, are unalterably opposed to popular elections in the District of Columbia.

Thus there is a clear connection between election burdens and discriminations and the first and central issue in this case: namely, the denial of voting representation in Congress to the People of the District of Columbia.

Here are some of the discriminations made by the D.C. Election Law:

A. Only the Democratic and Republican parties are allowed to nominate presidential electors "by message to the Election Board." All others must obtain at least ten thousand signatures to get their candidate on the ballot. [5]

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[5] Section 8 (d) of the Election Act grants the exclusive right to nominate candidates for President to "each political party who has had its candidate elected as President of the United States after January 1, 1950," that is, Democratic and Republican parties only. Any other political party, according to section 8(f), must submit a nominating petition containing signatures of "at least 5 per centum of registered qualified electors of the District of Columbia" in order to have its candidate placed on the general election ballot.
There were 201,937 persons "registered to vote" in the last persidential election which was November 5, 1968. 5% of that number is 10,097.
Section 8(d) and 8(e) grant the right to nominate candidates for Presidential Electors only to local parties recognized by a national committee.
Section 8(d) grants the right to the Democratic and Republican parties "to nominate candidates for presidential electors...by message to the Board of Elections." No other elective office or party is accorded such privilege. Section 8(e) entitles these same political parties to have their candidates' names placed on the ballot. Section 8(g) enables these same political parties to bind electors by oath before the Elections Board to cast their ballot in the electoral college for their party's choice.

One of the privileged parties is clearly a minority party in the District of Columbia; namely, the Republican party. In the recent primary it polled only a little over seven thousand votes, or only two thousand more than the number of signatures required on the petition of an idependent to get on the general election ballot. (See F, infra). Of course, since there was no opposition in the primary, the Republican candidate was entitled to be on the general ballot with only two thousand signatures in any event, Section 9 (h). But the low participation demonstrates that favored parties under the Election Law are not necessarily parties having a large number of adherents in the District of Columbia. There are only 31,000 registered Republicans here; there are 155,000 registered Democrats.

B. Only the Democratic and Republican parties are allowed to hold primary elections.[6] This is not merely a disadvantage from the point of view of getting a candidate's name on the ballot, it denies new parties, such as the DC Statehood Party an opportunity to expose it's candidates and issues to notoriety and public discussion. The Congressional campaign in this city began in November but the D.C. Statehood Party was not allowed to participate until very recently because it could not hold a primary.

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[6] By operation of Section 8(h) of the Election Act, the right "to hold a primary election to select candidates for election to the office of Delegate in a general election" is granted only to parties which obtained at least 7,500 votes in the last general election for Delegate or for President and Vice President. Since only the Democratic and Republican parties were permitted to, and did in fact, nominate candidates in the last Presidential election, and there has been no previous election of Delegate, only the national Democratic party and the national Republican party are permitted to conduct primary elections.

C. There is no provision of the DC Election Law for placing a political party's nominee on the general election ballot unless such candidate was nominated in a primary election. The Elections Board has ruled that a candidate qualifying under Section 8(j) (1) may appear on the general election ballot as the candidate of "a party of his choice," But political parties, other than the established ones, are accorded no right of nomination whatsoever. Having an independent candidate specify his party affiliation is a poor substitute for having that party nominate a candidate. Such a ruling is completely destructive of party responsibility.

D. A new party is not given the right to submit issues or questions to the electorate. The Election Board refused to place the issue of statehood on the general ballot, pointing out that only those parties permitted to hold primaries – that is, the Democratic and Republican Parties – could submit questions to their members.[7]

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[7] Section 8(c) (2). Statehood has been contemplated for the District at least since 1871 when a territorial type of government with a nonvoting delegate was established by the Act of February 21, 1871, 16 Stat. 419, and is obviously contemplated by the D. C. Delegate Act of 1970. See Statehood for Hawaii, Senate Report No. 80, 80th Congress, First Session, p. 5. There it is pointed out that an historically recognized first step in the procedures for admission as a new state under Article IV, Section 3 of the Constitution is a referendum to the people on that issue. The Board of Elections had no right to refuse to conduct such a plebescite in light of its historical propriety and usage under Article IV and the circumstance that statehood of the District of Columbia has been under contemplation since at least 1871.

The District of Columbia has a larger population than ten states: Alaska, Delaware, Idaho, Montana, Nevada, New Hampshire, North Dakota, South Dakota, Vermont, Wyoming. The Senators from these states make up twenty percent of the voting power of the Senate, while

E. Signature and filing fee requirements, even for established party candidates, go far beyond that which can be justified by any "compelling government interest."[8]

A study of Tables I, II, and II appended to the motions in this case, shows that nowhere in the 50 states is there a combined signature-filing fee requirements for established party candidates as burdensome as those imposed on Delegate candidates in the District of Columbia. In only four out of fifty states do Congressional candidates for established parties have to provide more than a thousand nominating signatures and in at least forty-one states, such signature requirements are 500 or less.

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the nearly 800,000 citizens of the District are not represented at all. See Table IV attached to motions in District Court.

Not only is the District larger than many states; it is also larger than twenty independent nations of the world including twelve who have an equal voice with the United States in the United Nations General Assembly.

Every territory since 1789 except Oklahoma had fewer people at the time of its admission to the Union than the District of Columbia does right now.

"It should offend the democratic sense of this nation that 850,000 citizens of its Capital, comprising a population larger than eleven of its states, have no voice in Congress." (Richard Nixon, Message to Congress, April 28, 1968).

[8] Section 8(i) requires that a delegate candidate in a primary election (and, as we have seen, this means Democratic or Republican parties only) file a nominating petition, "signed by at least two thousand persons who are duly registered under Section 7 and who are of the same political party as the nominee...accompanied by a filing fee of $100." Section 8(1) prevents a voter from signing more than one nominating petition "in the same election." All signatures must be obtained within the short space of 54 days. No filing fee is required in other party elections. The signature requirements for other city-wide party elections are two-hundred, Section 8(1),(b), and (c).

As can also be seen from these tables, substantial signature and filing fee requirements are everywhere under constitutional attack, and a number of such attacks have already been sustained in the courts.

Such tables clearly establish the lack of a "compelling governmental interest" in substantial requirements of this kind since the overwhelming majority of states manage to conduct their Congressional elections with only nominal requirements in this area, at least as respects established party candidates.

These burdensome requirements must also be considered in light of the further fact that a candidate who has weathered all the financial and organizational drains of nominating petitions and filing fees still faces the prospect of conducting four separate election campaigns: a primary, a primary runoff, an election and an election runoff while, at the same time, popular interest in the election slowly dies away, Section 10(4).

The heavy requirements for gathering nominating signatures were imposed with full knowledge of the low voter participation in the District of Columbia (p. 32 of the House Report) and the hopelessness of voting for a Delegate who has no vote.

F. An independent candidate is required to furnish 5000 signatures to obtain a place on the general election ballot whereas the candidate of an established party, even a minority party such as the Republican party, need only furnish 2000 signatures to obtain a place on the general election ballot.[9]

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[9]To run in the primary of a political party, which as previously shown, means the primary of either the Republican or Democratic parties only, the nomination petition requires 2000 signatures of registered voters according to Section 8(i). In the event the number of nominees does

This last mentioned discrimination was the sole point of decision in *Moore v. Election Board*, C. A. No. 3296-70 USDCDC, decided November 19, 1970 although it was not there considered in relationship to new or minority party candidates as here. The only issue raised in *Moore* was the constitutionality of provisions requiring that "independent candidates must obtain more signatures for nomination than primary candidates; that they must solicit signatures later than primary candidates; and that they may be foreclosed from obtaining signatures from registered voters who have already signed a nomination petition for primary canidates." This last mentioned discrimination was eliminated by court interpretation.

An appeal to this Court was noted from the three-judge court ruling in the *Moore* case by the plaintiff. It was later abandoned too late for the intervenors, some of whom are petitioners here, to note their own appeal.

For all practical purposes these present proceedings provide the only forum where the many parties whom the Reverend Douglas Moore purported to represent can obtain a definitive ruling on the numerous burdens and

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not exceed the number of be elected (that is, one in the case of Delegate), the Board of Elections is bound to place his name on the ballot of the general election according to Section 9(h). This occured in the current Delegate election, Mr. Nevius being the only Republican candidate to file a nominating petition with the requisite number of signatures. He is, therefore, automatically entitled to a place on the general election ballot.

A candidate specifying another political party, or an independent candidate, must present a petition signed by "duly registered voters equal in number of 2 per centum of the total number of registered voters...or by five thousand persons duly registered under section 7, whichever is the less..." The latest available statistics of the Board of Elections show the "total number of registered voters" as of January 4, 1971 to be 257,016. 2% of that amount is 5,140.

disciminations imposed on the electoral process by the DC Election Law.

The DC Election Law, like the Ohio Election Law struck down in *Williams v. Rhodes*, 393 US 29, 31, (1968) gives "the two old, established parties a decided advantage over any new parties struggling for existence and thus place susbstantially unequal burdens on both the right to vote and the right to associate. The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms'."

The Hatch Act multiplies the advantages granted established parties by the election law.

The Hatch Act excludes more than half of the voting population of the District of Columbia from participating in the Congressional election campaign, even to the point of preventing federal employees from circulating (not soliciting) nominating petitions.

Were it not for the fact that candidates of the Democratic and Republican parties are running in this election it would be clear under § 7326 (1) of the Hatch Act that federal employees could take an active part in the Congressional election.[10]

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[10] In the opinion of the General Counsel of the Civil Service Commission, Addendum E3-E4 to the amended complaint, "Section

Under this section, federal employees would be free to participate fully as they do, for example, in state legislature races in Minnesota and municipal elections in Los Angeles. However, because these two old established parties are involved, federal employees cannot participate even on behalf of non-partisan candidates.

Even with the Democratic and Republican parties participating, federal and District of Columbia government employees should be allowed to participate in the Congressional election under the exemption granted by § 7327(b) of the Hatch Act since (1) the majority of the voters are employed by the government of the United States; (2) it is in the employees' interest to participate, and (3) such participation is allowed in most Maryland and Virginia communities surrounding the District of Columbia. However the Civil Service Commission has arbitrarily construed this statute "as limiting the exemption to participation in elections for local office." [11]

7326 of title 5, United States Code, permits political activity in connection with a nonpartisan election. A nonpartisan election is one in which none of the candidates to be nominated or elected represents a party "any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected." Election as used in this code section refers to the nationwide election for President and not merely that part of it held in the District of Columbia. If a party received votes elsewhere, it would not matter that its candidates for presidential elector received no votes in the District of Columbia. The election is nonpartisan only if none of the candidates for Delegate represents any party (Republican, Democratic or other) whose candidates for presidential elector received votes in the last preceding nationwide election. Thus, if the American Independent Party (which received electoral votes in the last presidential election) entered a candidate in the election for office of Delegate, the election would be partisan and prohibitions against participation would apply."

[11] See opinion of the General Counsel of the Civil Service Commission, Addendum E4 to the amended complaint. In *Democratic State Central*

Finally, the Commission has ruled that employees subject to the Hatch Act may neither solicit nor circulate the nominating petitions provided for by Sections 8(i) and 8(j) of the DC Election LAw. (Addendum E5 to the complaint).

The clear effect of these several unreasonable classifications and doubtful interpretations is to aggravate the problem of signature gathering and other political activities, thereby augmenting the advantages accorded the two old established national parties by the DC Election Law.

In a city like Washington where more than half the working population is employed by the Federal or District Government,[12] this amounts to an extraordinary multiplication of the advantages accorded established political parties by the DC Election Law.

The constitutionality of the Hatch Act was sustained by the Supreme Court in *United Public Workers, etc. v. Mitchell*, 330 US 75 (1947) and *Oklahoma v. Civil Service Commission*

Committee v. Andolsek, 349 F. Supp 1009 (Md. 1966) the court sustained, as a general proposition, the distinction made under §7327 (b) between "partisan and nonpartisan" local politics, but specifically refrained from ruling on its inter-party aspects, *Ibid* p. 1019. Nor did the court rule on the "local office" aspect as such.

[12] 1969 figures are not readily available in a single source. However, total population of the District of Columbia in 1969 was 798,000 (Population Estimates and Projections, No. 436, p. 25, D.C. Government, Information Office). The total working population, resident in the District of Columbia, 1969, age 20 and over was 315,000 (Unpublished data, Bureau of Labor Statistics). Total government employees resident in the District of Columbia in 1969: Federal 145,000, D.C. Government, 11,600: Total 156,000 (National Capital Planning Council).

330 US 127 (1947). Both were decided the same day by a court divided 4 to 3 with 2 justices not participating. It has been urged recently, and it is urged here, that *Mitchell and Oklahoma* have been implicity overruled by a number of subsequent cases, and that the proper criteria under such cases as *Sweezy v. New Hampshire*, 354 US 234 (1957) and *Shelton v. Tucker*, 364 US 479 (1960) require the government to show a compelling need to justify any regulation of First Amendment Rights, and such regulations must be drawn with narrow specificity.

The Hatch Act (1) violates the First Amendment by reason of its overbreadth and the Fifth Amendment by reason of its vagueness, (2) violates also the Ninth and Tenth Amendments by infringing on the fundamental right to association for political purposes, and (3) irrationally discriminates against public employment contrary to the Fifth and Fourteenth Amendment.

These contentions were recently considered by a three-judge court in the Northern District of California, *Fishkin v. United States Civil Service Commission*, 309 F. Supp 40 (1969). While acknowledging the force of the arguments the court felt that, as a lower federal court, it was not its place to pronounce Supreme Court decisions impliedly overruled except in the clearest cases. An appeal was taken, but the Supreme Court dismissed "for failure to docket the case within the time prescribed by Rule 13," *Fishkin v. United States Civil Service Commission*, 396 US 278, Order of January 12, 1970.

Appellants rely on the same contentions made in *Fishkin*, but in addition they assert that the classification created by § 7326 (1) and 7327(b) of the Hatch Act and the Commission's interpretation of §7324 (a) (2) result in arbitrary and irrational discrimnations against the People of the District of Columbia in general and new political parties

there in particular, contrary to *Williams v. Rhodes*, 393 US 23 (1968).

Furthermore, entirely apart from the constitutionality of the Hatch Act, its incidence must be considered in gauging the practical effect of the DC Election Law. Considered in the context of recognized rulings under the Hatch Act the Election Law operates to grant an enormous advantage to established political parties in no way justified by a compelling governmental interests, *Williams v. Rhodes, supra.*

Cumulative effect v. isolated items

The Court of Appeals, while holding most of the constitutional claims presented here insubstantial, remanded the case for further consideration of the constitutional claims made with respect to presidential elections.

This ruling would seem to trespass upon the prerogatives of any three-judge court which might be convened on remand, *Zemel v. Rusk* 381 US 1 (1965).

Moreover under *Williams v. Rhodes, supra*, the proper test is whether the totality of the "restrictive laws taken as a whole imposes a burden on voting and associational rights" 393 US at page 34. The right of the DC Statehood Party to conduct a presidential election campaign, for example, cannot be separated legally or practically from its right to conduct Congressional campaigns also. They will be conducted at the same time in 1972. It is the *cumulative effect* of these laws that counts. Another provision singled out by the Court of Appeals—the filing fee—cannot be considered in isolation from all the other discouragements to a poor candidate or a new party. A single discrimination by

itself might be considered only an annoyance; but piled on top of other "annoyances" they result in a very considerable burden. This Court should therefore consider these burdens, not in separate legal compartments, but in their total practical effect; and their total practical effect amounts to an enbalming of status quo politics, status quo political parties, and voter apathy in the District of Columbia.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted

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APPENDIX

OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1009

Julius W. Hobson, Tina C. Hobson, The D. C. statehood Party, Charles I. Cassell, Rev. Joe L. Gipson, Warren Morse, Bettie Randall, Rev. William Wendt, Sammie A. Abbott, Dr. David A. Dabney, Etta Horn, Lorenzo J. Neal, and William Scheirer, Appellants,

vs.

Board of Elections for the District of Columbia, J. E. Bindeman, Robert E. Martin, Charles B. Fisher, Civil Service Commission, Robert E. Hampton, James E. Johnson, and L. J. Andolsek, Appellees

Before: McGowan, Mackinnon and Robb, Circuit Judges

[Filed March 11, 1971]

ORDER

This appeal from a judgment of the District Court refusing to convene a three-judge court and dismissing the complaint having come on for expedited hearing, and the court having considered the matter on the papers and the arguments of counsel, it is hereby

ORDERED that the judgment appealed from, insofar as it relates to (a) the nonvoting status of the officer provided by the District of Columbia Delegate Act and (b) the various statutory provisions bearing upon the manner of his selection, is affirmed by reason of the insubstantiality of the questions raised. *See Loughborough v. Blake*, 18 U.S. (95 Wheat.) 317 (1820); *Heald v. District of Columbia*, 259 U.S. 114 (1922); *Carliner v. Commissioner of the District of Columbia, 134 U.S. App. D. C. 43, 412 F. 2d 1090, cert. denied*, 396 U.S. 987 (1969); *Breakefield v. District of Columbia* U.S. App. D. C. , F. 2d , *cert. denied*, February 22, 1971; *Hobson v. Tobriner*, 255 F. Supp. 295 (D.D.C. 1966), petition for review of mandamus denied *sub nom. Hobson v. Gasch* (D. C. Cir. No. 20,838, decided September 29, 1966), *cert. denied*, 386 U.S. 914 (1967); *Moore v. Board of Elections*, 319 F. Supp. 437 (D.D.C. 1970); *Lyons v. Davoren*, 402 F. 2d 890 (1st Cir. 1968); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). The court is also of the view that, with respect to the challenge to the filing fee requirements, the allegations of the complaint do not present any live controversy appropriate for judicial resolution; and it is further

ORDERED that, insofar as the judgement appealed from involves the challenge by appellants to the party qualifying provisions for the Presidential election contained in Section 8(f) of the District of Columbia Election Act, it is vacated and the case remanded to the District Court for hearing and determination of the preliminary question of whether the constitutional issues are sufficiently ripe for resolution at this time at the instance of these appellants as to warrant the convening of a three-judge court. *See Georgia Socialist Workers Party v. Fortson*, 315 F. Supp. 1035 (N. D. Ga.), *prob. juris. noted*, 400 U.S. 877 (1970), with which compare *Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262 (S. D. Ohio 1970). We intimate no opinion as to the merits of those issues.

Per Curiam

DISTRICT OF COLUMBIA DELEGATE ACT

Act of September 22, 1970, P. L. 91-405, 84 Stat. 848

Sec. 202. Delegate to the House of Representatives

(a) The people of the District of Columbia shall be represented in the House of Representatives by a Delegate, to be known as the "Delegate the House of Representatives from the District of Columbia", who shall be elected by the voters of the District of Columbia in accordance with the District of Columbia Election Act. The Delegate shall have a seat in the House of Representatives, with the right of debate, but not of voting, shall have all the privileges granted a Representative by section 6 of Article I of the Constitution, and shall be subject to the same restrictions and regulations as are imposed by law or rules on Representatives. The Delegate shall be elected to serve during each Congress.

(b) No individual may hold the office of Delegate to the House of Representatives from the District of Columbia unless on the date of his election–

(1) he is a qualified elector (as that term is defined in section 2(2) of the District of Columbia Election Act) of the District of Columbia;

(2) he is at least twenty-five years of age;

(3) he holds no other paid public office; and

(4) he has resided in the District of Columbia continuously since the beginning of the three-year period ending on such date.

He shall forfeit his office upon failure to maintain the qualifications required by this subsection.

Sec. 206. First Elections and Effective Date

(a) Before the expiration of the seven-calendar-month period beginning on the first day of the first calendar month beginning on or after the date of the enactment of this Act, the Board of Elections of the District of Columbia shall—

(1) conduct such special elections as may be be necessary to select candidates for the office of Delegate to the House of Representatives from the District of Columbia;

(2) provide for the direct nomination by petition of candidates for such offices; and

(3) conduct such other special elections as may be necessary to select from such candidates the Delegate to the House of Representatives from the District of Columbia. The Board of Elections shall prescribe the date on which each election under paragraphs (1) and (3) shall be held, the dates for the circulation and filing of nominating petitions for such elections, and such other terms and conditions which it deems necessary for the conduct of such elections within the period prescribed by the subsection. Nominating petitions for an election under paragraph (1) shall meet the requirements of clauses (2) and (3) of section (8)(i) of the District of Columbia Election Act and nominating petitions under paragraph (2) shall meet the requirements of clauses (B) and (C) of section 8(j) (1) of such Act.

(b) This title and the amendments made by this title shall take effect on the date of its enactment.

DISTRICT OF COLUMBIA ELECTION LAW

Act of August 12, 1955, ch. 862, 69 Sat. 699; Act of October 4, 1961, P. L. 87-389, 75 Stat.

817; Act of April 22, 1968, P. L. 90-292, 82 Stat. 103; Act of September 22, 1970, P. L. 91-405, Sec. 203 and 205 of Title II, 84 Stat. 849.

Note: *Whenever relevant in the text following, the source will be indicated by reference to the year of the statute, i.e. "as amended by 1970 act," or "as added by 1968 act."*

Sec. 1. Election of electors of President and Vice President, the Delegate to the House of Representatives, the members of the Board of Education, and officials of political parties.

In the District of Columbia electors of President and Vice President of the United States, the Delegate to the House of Representatives, the members of the Board of Education, and the following officials of political parties in the District of Columbia shall be elected as provided in this chapter:

(1) National committeemen and national committee women;

(2) Delegates to conventions of political parties nominating candidates for the Presidency and Vice Presidency of the United States; and

(3) Such members and officials of local committees of political parties as may be designated by the duly authorized local committees of such parties for election at large in the District of Columbia.

As amended by 1970 Act

Sec. 2. Definitions

* * *

(2) The term "qualified elector" means a citizen of the United States (a) who does not claim voting residence or right to vote in any State or Territory; and who, for the purpose of voting in an election under this chapter, has resided or has been domiciled in the District continuously since the beginning of the one-year period ending on the day of such election; (b) who is, or will be on the day of the next election, twenty-one years old; (c) who has never been convicted of a felony in the United States, or if he has been so convicted, has been pardoned; and (d) who is not mentally incompetent as adjudged by a court of competent jurisdiction.

* * *

As amended by 1970 Act

* * *

Sec. 7. Registration-Conditions for registration–Registration affidavit–Registration period–Appeal.

(a) A person shall be entitled to vote in an election in the District of Columbia only if he is a qualified elector and, except as provided in subsection (e) of this section, he is duly registered in the District on the date of such election. A person shall be considered duly registered in the District if he registers under this chapter after January 1, 1968, and if after the date he registers no four-year period elapses during which he fails to vote in an election held under this chapter;

(b) No person shall be registered unless–

(1) he is a qualified elector;
(2) he executes a registration affidavit by signature or mark (unless prevented by physical disability) on the form prescribed by the Board pursuant to subsection (c) showing that he meets each of the requirements specified in section 2 (2) for a qualified elector or qualifies under procedures established by the Board under paragraph (6) of subsection (a) of section 5, and, if he desires to vote in a party election, such form shall show his political party affiliation.

* * *

(d) (1) The registry shall be open during reasonable hours, except that the registry shall not be open (A) during the thrity-day period ending on the first Tuesday following the first Monday in November of each odd-numbered calendar year and of each presidential election year, (B) during the thirty-day period ending on the first Tuesday in May in each presidential election year, and (C) during such other period as the Board may provide in the case of a special election.

* * *

As amended by 1968 Act

Sec. 8. Candidates for office–Form and date for filing petitions–Number of signatures required–Arrangement of ballot–Nominations for presidential electors– Names of candidates for President and Vice President to appear on ballot under party designation–Form of Ballot–Candidates for electors not to appear on ballot– Nominations by non-qualifying political parties–Qualifications of electors–Nominating petition for election of members of Board of Education–Filing fee–Rules relating to Board of Education petitions–Posting of petitions in a public

place—Challenging validity of petition—Board of Elections to determine validity of petitions—Appeal--Arrangement of names on ballot.

(a) Candidates for office participating in an election of the officials referred to in clauses (1) and (2) of section 1 and of officials designated pursuant to clause (3) of such section shall be the persons registered under section 7 who have been nominated for such office by a petition—

(1) prepared and presented to the Board in accordance with rules prescribed by the Board, but not later than forty-five days before the date of the election; and

(2) signed by not less than two hundred voters, registered under section 7 and of the same political party as the nominee.

(b) No such person shall hold elected office pursuant to this chapter unless he has been a bona fide resident of the District of Columbia continuously since the beginning of the three-year period ending on the date of the next election, and is a qualified elector registered under section 7.

(c) Except as otherwise provided, the Board shall arrange the ballot of each political party so as to enable the voters of such party—

(1) to vote, in any election of officials referred to in clauses (1) and (2) of the first section of this Act and of officials designated pursuant to clause (3) of such section, separately or by slates for the candidates duly qualified and nominated for election to each such office or group of offices by such party under subsections (a) and (b) of this section; and

(2) to answer in the affirmative or negative such questions relating to the conduct of the affairs of such party as the duly authorized local committee of such party may file with the Board in writing: *Provided, however,* That the questions shall be so filed not later than thirty days before the date of the election.

(d) Each political party who has had its candidate elected as president of the United States after January 1, 1950, shall be entitled to nominate candidates for presidential electors. The executive committee of the organization recognized by the national committee of each such party as the official organization of that party in the District of Columbia shall nominate by appropriate means the presidential electors for that party. Nominations shall be made by message to the Board of Elections on or before September 1 next preceding a presidential election.

(e) The names of the candidates of each political party for President and Vice President shall be placed on the ballot under the title and device, if any, of that party as designated by the duly authorized commmittee of the organization recognized by the national committee of that party as the official organization of that party in the District. The form of the ballot shall be determined by that Board. The position on the ballot of names of candidates for President and Vice President shall be determined by lot. The names of persons nominated as candidates for electors of President and Vice President shall not appear on the ballot.

(f) A political party which does not qualify under subsection (d) of this section may have the names of its candidates for President and Vice President of the United States printed on the general election ballot provided a petition nominating the appropriate number of candidates for presidential electors signed by at least 5 per centum of registered qualified electors of the District of Columbia, as

of July 1 of the year in which the election is to be held is presented to the Board on or before August 15 preceding the date of the presidential election.

(g) No person may be elected to the office of elector of President and Vice President pursuant to this chapter unless (1) he is a registered voter in the District and (2) he has been a bona fide resident of the District for a period of three years immediately preceding the date of the presidential election. Each person elected as elector of President and Vice President shall, in the presence of the Board, take an oath or solemnly affirm that he will vote for the candidates of the party he has been nominated to represent, and it shall be his duty to vote in such manner in the electoral college.

(h) The Delegate shall be elected by the people of the District of Columbia in a general election. The nomination and election of the Delegate and the candidates for office of Delegate shall be governed by the provisions of this Act. Each candidate for the office of Delegate in any general election shall, except as other wise provided in subsection (j) of this section and in section 10 (d), have been elected as such a candidate by the next preceding primary or party runoff election. No political party shall be qualified to hold a primary election to select candidates for election to the office of Delegate in a general election unless, in the next preceding election year, at least seven thousand five hundred votes were cast in the general election for a candidate of such party for the office of Delegate or for its candidates for electors of President and Vice President.

(i) Each candidate in a primary election for the office of Delegate shall be nominated for such office by a petition (1) filed with the Board not later than forty-five days before the date of such primary election; (2) signed by at least two thousand persons who are duly registered under

section 7 and who are of the same political party as the nominiee; and (3) accompanied by a filing fee of $100. Such fee may be refunded only in the event that the candidate withdraws his nomination by writing received by the Board not later than three days after the date on which nominations are closed under this subsection. A nominating petition for a candidate in a primary election for the office of Delegate may not be circulated for signature before the ninety-ninth day preceding the date of such election and may not be filed with the Board before the seventieth day preceding such date. The Board may prescribe rules with respect to the preapration and presentation of nominating petitions and the posting and disposition of filing fees. The Board shall arrange the ballot of each political party in each such primary election so as to enable a voter of such party to vote for any one duly nominated candidate of that party for the office of Delegate.

(j) (1) A duly qualified candidate for the office of Delegate may, subject to the provisions of this subsection, be nominated directly as such a candidate for election in the next succeeding general election for such office (including any such election to be held to fill a vacancy). Such person shall be nominated by a petition (A) filed with the Board not less than forty-five days before the date of such general election; (B) signed by duly registered voters equal in number to 2 per centum of the total number of registered voters of the District, as shown by the records of the Board as of ninety-nine days before the date of such election, or by five thousand persons duly registered under section 7, whichever is less; and (C) accompanied by a filing fee of $100. Such fee may be refunded only in the event that the candidate withdraws his nomination by writing received by the Board not later than three days after the date on which nominations are closed under this subsection. No signatures on such a

petition may be counted which have been made on such petition more than ninety-nine days before the date of such election.

(j) Nominations under this subsection for election in a general election for the office of Delegate shall be of no force and effect with respect to any person whose name has appeared on the ballot of a primary election for such office held within eight months before the date of such general election.

(k) In each general election for the office of Delegate, the Board shall arrange the ballots so as to enable a voter to vote for any one of the candidates for such office who (1) has been duly elected by any political party in the next preceding primary or party runoff election for such office, (2) has been duly nominated to fill vacancies in such office pursuant to subsection (d) of section 10, or (3) has been nominated directly as a candidate under subsection (j) of this section.

(l) The signature of a registered voter on any petition filed with the Board and nominating a candidate for election in a primary or general election to any office shall not be counted if, after receipt of a timely challenge to such effect, the Board determines such voter also signed any other valid petition, filed earlier with the Board, and nominating the same or any other candidate for the same office in the same election.

(m) Designations of offices of local party committees to be filled by election pursuant to clause (3) of the first section of this Act shall be effected by written communications filed with the Board not later than ninety days before the date of such election.

(n) (1) Except in the case of the three members of the Board of Education elected at large, the members of the Board of Education shall be elected by the qualified electors of the respective wards of the District from which the members have been nominated.

(2) In the case of the three members of the Board of Education elected at large, each such member shall be elected by the qualified electors of the District.

(o) Each candidate in a general election for member of the Board of Education shall be nominated for such office by a petition (A) filed with the Board not later than forty-five days before the date of such general election; (B) signed by at least two hundred and fifty persons who are duly registered under section 7 in the ward from which the candidate seeks election, or in the case of a candidate running at large, signed by at least one hundred and twenty-five persons in each ward of the District who are duly registered in such ward; and (C) accompanied by a filing fee of $100. Such fee may be refunded only in the event that the candidate withdraws his nomination by writing received by the Board not later than three days after the date on which nominations are closed. A nominating petition for a candidate in a general election for member of the Board of Education may not be circulated for signatures before the ninety-ninth day preceding the date of such election and may not be filed with the Board before the seventieth day preceding such date. The Board may prescribe rules with respect to the preparation and presentation of nominating petitions and the posting and disposition of filing fees. In a general election for members of the Board of Education, the Board shall arrange the ballots in each ward to enable a voter registered in that ward to vote for any one candidate duly nominated to be elected to such office from such ward, and to vote for as many candidates duly nominated

for election at large to such office as there are Board of Education members to be elected at large in such election.

(p) (1) The Board is authorized to accept any nominating petition for a candidate for any office as bona fide with respect to the qualifications of the signatories thereto if the original or facsimile thereof has been posted in a suitable public place for the ten-day period beginning on the forty-second day before the date of the election for such office. Any qualified elector may within such ten-day period challenge the validity of any petition by a written statement duly signed by the challenger and filed with the Board and specifying concisely the alleged defects in such petition. Copy of such challenge shall be sent by the Board promptly to the person designated for the purpose in the nominating petition.

(2) The Board shall receive evidence in support of and in opposition to the challenge and shall determine the validity of the challenged nominating petition not more than eight days after the challenge has been filed. Within three days after announcement of the determination of the Board with respect to the validity of the nominating petition, either the challenger or any person named in the challenged petition as a nominee may apply to the District of Columbia Court of Appeals for a review of the resonableness of such determination. The court shall expedite consideration of the matter and the decision of such court shall be final and not appealable.

(q) In any election, the order in which the names of the candidates for office appear on the ballot shall be determined by lot, upon a date or dates and under regulations prescribed by the Board.

As Amended by 1970 Act

Sec. (h), (i), (j), (k), (l), and (m) added by 1970 Act; (n) (o),

(p), and (q) relettered by 1970 Act after being added by 1968 Act

Sec. 9 Method of voting–Place–Watchers–Challenging of vote–Appeal from challenged ballots–Handicapped and absent voters–Voting in party elections.

* * *

(g) No person shall vote more than once in any election nor shall any person vote in a primary or party runoff election held by a political party other than that to which he has declared himself to be a member.

(h) In the event that the total number of candidates of one party nominated to an office or group of offices of that party pursuant to section 8(a) or 8(i) of this Act does not exceed the number of such offices to be filled, the Board may, prior to election day and, notwithstanding the provisions of section 8(c) or 8(i) of this Act, declare the candidates so nominated to be elected without opposition, in which case the fact of their election pursuant to this paragraph shall appear for the information of the voters on any ballot prepared by the Board for their party for the election of other candidates in the same election.

* * *

As amended by 1970 Act

Sec. 10. Dates for holding elections–Voting house–Method of deciding tie votes–Naming successor to official who dies, resigns, or is unable to serve– Votes cast for President and Vice President to be counted as votes for presidential electors–Election of ward and at large members of Board of Education–Runoff elections–Filling of vacancies on Board of Education.

* * *

(4) Runoff elections shall be held whenever (A) in any primary election of a political party for candidates for the office of Delegate no one candidate receives at least 40 per centum of the total votes cast in that election for all candidates of that party for that office, and (B) in any general election for the office of Delegate, no one candidate receives at least 40 per centum of the total votes cast in that election for all candidates for that office. Any such runoff election shall be held not less than two weeks nor more than six weeks after the date on which the Board has determined the results of the preceding primary or general election as the case may be. At the time of announcing any such determination, the Board shall establish and announce the date on which the runoff election will be held, if one is required. The candidates in any such runoff election shall be the two persons who received, respectively, the two highest numbers of votes in such preceding primary or general election; except that if any person withdraws his candidacy from such runoff election (under the rules and within the time limits prescribed by the Board), the person who received the next highest number of votes in such preceding primary or general election and who is not already a candidate in the runoff election shall automatically become such a candidate.

* * *

(d) In the event that any official, other than a member of the Board of Education, elected pursuant to this chapter dies, resigns, or becomes unable to serve during his or her term of office leaving no person elected pursuant to this chapter to serve the remainder of the unexpired term of office, the successor or successors to serve the remainder of such term shall be chosen pursuant to the rules of the

duly authorized party committee: *Provided*, That such successor shall have the qualifications required by this Act for such office.

* * *

As amended by 1979 Act

Subsections (3), (4) and (5) added by 1979 Act; other subsections renumbered

Sec. 11. Petition for recount by candidate; Procedure; Expenses; Petition for recount by voter to District of Columbia Court of Appeals; Grounds for voiding election.

* * *

(b) Within seven days after the Board certifies the results of an election, any person who voted in the election may petition the District of Columbia Court of Appeals to review such election. In response to such a petition, the court may set aside the results so certified and declare the true results of the election, or void the election in whole or in part. To determine the true results of an election the court may order a recount or take other appropriate action, whether or not a recount has been conducted or requested pursuant to subsection (a). The court shall void an election only for fraud, mistake, the making of expenditures by a candidate in violation of this chapter, or other defect, serious enough to vitiate the election as a fair expression of the will of the registered qualified electors voting therein. If the court voids an election it may order a special election, which shall be conducted in such manner (comparable to that prescribed for regular elections), and at such time, as the Board shall prescribe. The decision of such court shall be final and not appealable.

As amended by 1968 Act.

* * *

Sec. 14. False registration, fraud, and other corrupt practices in elections–Penalties.

Any person who shall . . . attempt to vote in an election held by a political party other than that to which he has declared himself to be affiliated . . . shall upon conviction thereof be fined not more than $500 or be imprisoned not more then ninety days, or both. . . .

As amended by 1970 Act.

THE HATCH POLITICAL ACTIVITIES ACT

Act of August 2, 1939, 53 Stat 1147; July 19, 1940, 54 Stat 767; September 6, 1966, P. L. 89-554, 80 Stat. 525.

§ 7324. Influencing elections; taking part in political campaigns; prohibitions; exceptions

(a) An employee in any Executive agency or an individual employed by the Government of the District of Columbia may not–

(1) use his official authority or influence for the purpose of interfereing with or affecting the result of an election; or

(2) take an active part in political management or in political campaigns. For the purpose of this subsection, the phrase "an active part in political management or in political campaigns" means those acts of political mananagement of political campaigning which were

prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

(b) An employee or individual to whom subsection (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates.

(c) Subsection (a) of this section does not apply to an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by the District of Columbia or by a recognized religious, philanthropic, or cultural organization.

(d) Subsection (a) (2) of this section does not apply to–
(1) an employee paid from the appropriation for the office of the President;
(2) the head or the assistant head of an Executive department or military department;
(3) an employee appointed by the President, by and with the consent of the Senate, who determines policies to be pursued by the United States in its relations with foreign powers or in the nationwide administration of federal laws;
(4) the Commissioners of the District of Columbia; or
(5) the Recorder of Deeds of the District of Columbia.

§ 7325. Penalties

An employee or individual who violates section 7324 of this title shall be removed from his position, and funds appropriated for the position from which removed thereafter may not be used to pay the employee or individual. However, if the Civil Service Commission finds by unanimous vote that

the violation does not warrant removal, a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Commission.

§ 7326. Nonpartisan political activity permitted

Section 7324 (a) (2) of this title does not prohibit political activity in connection with–

(1) an election and the preceding campaign if none of the canidates is to be nominated or elected at that election as representing a party any of whose canidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or

(2) a question which is not specifically identified with a National or State political party or political party of a territory or possession of the United States.

For the purpose of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with a National or State political party or political party of a territory or possession of the United States.

§ 7327. Political activity permitted; employees residing in certain minicipalities

(a) Section 7324 (a) (2) of this title does not apply to an employee of The Alaska Railroad who resides in a municipality on the line of the railroad in respect to political activities involving that municipality.

(b) The Civil Service Commission may prescribe regulations permitting employees and individuals to whom

section 7324 of this title applies to take an active part in political management and political campaigns involving the municipality or other political subdivision in which they reside, to the extend the Commission considers it to be in their domestic interest, when–

(1) the municipality or political subdivision is in Maryland or Virginia and in the immediate vicinity of the District of Columbia, or is a municipality in which the majority of voters are employed by the Government of the United States; and

(2) the Commission determines that because of special or unusual circumstances which exist in the municipality or political subdivision it is in the domestic interest of the employees and individuals to permit that political participation.

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BRIEF FOR RESPONDENTS, MEMBERS, BOARD OF ELECTIONS, IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1494

JULIUS W. HOBSON, TINA C. HOBSON, THE DC STATEHOOD PARTY, CHARLES I. CASSELL, REV. JOE L. GIPSON, WARREN MORSE, BETTIE RANDALL, REV. WILLIAM WENDT, SAMMIE A. ABBOTT, DR. DAVID A. DABNEY, ETTA HORN, LORENZO J. NEAL, AND WILLIAM SCHEIRER, *Petitioners,*

v.

BOARD OF ELECTIONS OF THE DISTRICT OF COLUMBIA, J. E. BINDEMAN, ROBERT E. MARTIN, CHARLES B. FISHER, CIVIL SERVICE COMMISSION, ROBERT E. HAMPTON, JAMES E. JOHNSON, AND L. J. ANDOLSEK, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

October Term, 1970

No. 1494

JULIUS W. HOBSON, TINA C. HOBSON, THE DC STATEHOOD PARTY, CHARLES I. CASSELL, REV. JOE L. GIPSON, WARREN MORSE, BETTIE RANDALL, REV. WILLIAM WENDT, SAMMIE A. ABBOTT, DR. DAVID A. DABNEY, ETTA HORN, LORENZO J. NEAL, AND WILLIAM SCHEIRER, *Petitioners*,

v.

BOARD OF ELECTIONS OF THE DISTRICT OF COLUMBIA, J. E. BINDEMAN, ROBERT E. MARTIN, CHARLES B. FISHER, CIVIL SERVICE COMMISSION, ROBERT E. HAMPTON, JAMES E. JOHNSON, AND L. J. ANDOLSEK, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS, MEMBERS, BOARD OF ELECTIONS, IN OPPOSITION

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should discretionarily decline to consider the merits of a certiorari petition seeking review of an interlocutory judgment of the United States Court of Appeals for the District of Columbia Circuit affirming in part the order of the District Court, on the basis that some of the tendered constitutional issues are not sufficiently substantial to warrant the convention of a three-judge court, and reversing in part the order of the District Court and

remanding the case with directions to consider whether the remaining constitutional questions are sufficiently ripe to warrant resolution by a three-judge court.

2. Whether District of Columbia residents are constitutionally entitled to a congressional representative with full voting rights.

3. Whether the provisions of the District of Columbia Election Act, which condition a party's eligibility to hold a primary election (in connection with the office of Delegate to Congress) on the obtaining by that party's candidate of at least 7500 votes in a previous election, create an invidious discrimination against a party whose candidate has not previously obtained such number of votes.

4. Whether the provisions of the District of Columbia Election Act, which condition an independent candidate's eligibility to run for the office of Delegate to Congress upon the securing of 2% of the signatures of the registered voters, create an invidious discrimination in favor of the candidates of major parties who are required to obtain the signatures of 2000 of their fellow party members in order to compete for the party's nomination in a primary election.

5. Whether the provisions of the Hatch Political Activities Act which preclude government employees from circulating nominating petitions and soliciting voter signatures combine with the signature requirements of the Election Act to create an invidious discrimination in favor of established party candidates against new party candidates and, as such, a denial of equal protection of the law.

COUNTER-STATEMENT OF THE CASE

Petitioner D. C. Statehood Party is a political entity seeking the admission of the District of Columbia as a constituent state of the union and petitioner Julius Hobson is the party's candidate for the office of Delegate to Congress from the District of Columbia. Other petitioners are members of the Democratic and Republican parties who

had announced their candidacies for the office of the Delegate to Congress, officers and members of the Statehood Party, federal and District of Columbia Government employees, and various District of Columbia and Maryland voters. (Amended complaint, J. A. 3-6.) The Delegate election was held on March 23, 1971.

In a class action filed prior to that election, petitioners challenged the constitutionality of various provisions contained in Acts of Congress governing elections in the District of Columbia, namely, the District of Columbia Delegate Act, P. L. 91-405 (hereinafter "the Delegate Act"); the District of Columbia Election Act of 1955, as amended §§ 1-1101 through 1-1114, D. C. Code, 1967, as amended by P. L. 91-405 (hereinafter "the Election Act"); and the Hatch Political Activities Act, P. L. 89-554, 5 U. S. C. A. §§ 7321 through 7327 (hereinafter "the Hatch Act") (Id., J. A. 3). Named as defendants were the members of the Board of Elections for the District of Columbia (hereinafter "the Board"), and the members of the United States Civil Service Commission (Id., J. A. 6).

In their amended complaint, petitioners allege that the Delegate Act is unconstitutional to the extent that it deprives them of a delegate in Congress with full voting rights. Petitioners additionally claim that they are constitutionally entitled to vote in a referendum on the question of statehood for the District of Columbia, and that the Board has refused to place this question on the ballot "at the next general election." (Id., J. A. 7-8.)

Petitioners assert that the Election Act discriminates against the D. C. Statehood Party in favor of the Democratic and Republican parties in setting forth the quantitative voter support requirement which must be met in order to conduct primary elections for the office of delegate (Id., J. A. 8). In addition, petitioners claim that the Election Act works an unjust discrimination against the D. C. Statehood Party *vis a vis* the Democratic and Republican

parties in requiring the Statehood Party to submit petitions containing an excessive number of voter signatures in order to directly nominate candidates for the office of delegate (Id., J. A. 8-9). Petitioners also assert in effect that the Election Act discriminates against the D. C. Statehood Party in favor of the Democratic and Republican parties in limiting the right to nominate candidates for presidential electors to those parties who have had their candidates elected as President of the United States after January 1, 1950, and by requiring that other parties obtain signatures of 5% of the registered voters in order to have the names of their candidates for the presidency placed on a general election ballot (Id., J. A. 8).

Petitioners go on to allege that the supposed discriminatory advantage created in favor of major parties by the Election Act is unconstitutionally enhanced by the Hatch Act's prohibition of political campaigning involving circulation of nominating petitions and solicitation of voter signatures by governmentally employed local residents (Id., J. A. 10).

Although petitioners do not claim inability to pay filing fees because of poverty, they nonetheless assert that the filing fee requirement of the Election Act "discriminates against the poor" and also imposes an unreasonable burden on non-indigent candidates for delegate (Id., J. A. 9). Finally, petitioners urge that the Hatch Act is unconstitutional to the extent that government employees are precluded from circulating nominating petitions and soliciting voter signatures in behalf of those seeking the office of Delegate to Congress (Id., J. A. 9-10).

On the basis of these allegations, petitioners sought the convention of a three-judge court for the purpose of enjoining the enforcement of the Delegate Act to the extent that it withholds from local residents a delegate to Congress with full voting rights. Petitioners also sought to en-

join enforcement of the challenged provisions of the Election Act and the Hatch Act. The District Court refused to convene a three-judge court and dismissed petitioners' complaint.

On appeal, the United States Court of Appeals for the District of Columbia Circuit, on March 11, 1971, held that:

> " * * * the judgment appealed from, insofar as it relates to (a) the nonvoting status of the officer provided by the District of Columbia Delegate Act and (b) the various statutory provisions bearing upon the manner of his selection, is affirmed by reason of the insubstantiality of the questions raised. * * * [Citations] The court is also of the view that, with respect to the challenge to the filing fee requirements, the allegations of the complaint do not present any live controversy appropriate for judicial resolution * * *."

The court reversed the judgment below to the extent that it involved a declaration of insubstantiality with respect to petitioners' challenge to the statutory criteria which nonestablished parties are required to meet in order to participate in presidential elections, stating that:

> " * * * insofar as the judgment appealed from involves the challenge by appellants to the party qualifying provisions for the Presidential election contained in Section 8(f) of the District of Columbia Election Act, it is vacated and the case remanded to the District Court for hearing and determination of the preliminary question of whether the constitutional issues are sufficiently ripe for resolution at this time at the instance of these appellants as to warrant the convening of a three-judge court. * * * [Citations] We intimate no opinion as to the merits of those issues."

This petition followed.

ARGUMENT

I

The interlocutory nature of the judgment of the Circuit Court of Appeals when viewed in combination with other circumstances will justify this Court's refusal to consider the merits of the petition.

The Circuit Court of Appeals partially affirmed the order of the District Court on the basis that some of the tendered constitutional issues are not sufficiently substantial to warrant the convention of a three-judge court. The court went on to partially reverse the same order and to remand the case to the District Court with directions to consider whether the remaining constitutional questions are sufficiently ripe to warrant convention of a three-judge court. The judgment of the Circuit Court of Appeals therefore lacks finality. While finality may not be an essential prerequisite to the exercise of this Court's certiorari jurisdiction over cases in circuit courts of appeals under 28 U. S. C. A. § 1254 (cf. *City of El Paso* v. *Simmons,* 379 U. S. 497, 501-503 (1965)), a lack of finality in an appropriate case certainly provides justification for this Court's discretionary refusal to invoke its certiorari jurisdiction under that statute. Cf. *Land* v. *Dollar,* 330 U. S. 731, 734 (1947). Such justification exists here.

As previously pointed out, this case involves multiple constitutional issues. In *Republic National Gas Co.* v. *Oklahoma,* 334 U. S. 62 (1948), this Court enunciated the salutary policy that fragmentary and piecemeal judicial review is to be avoided in cases involving issues of such a nature, stating:

> " * * * But for the soundest of reasons we ought not to pass on constitutional issues before they have reached a definitive stop. * * *"

Moreover, quite unlike a judgment of a circuit court of appeals with nationwide impact, this case involves the construction of locally applicable election statutes passed by Congress legislating for the District of Columbia in the same manner that a state legislature acts with respect to the state and its subdivisions. See *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 434-435 (1932). Compare *Slaker* v. *O'Conner,* 278 U. S. 188 (1929); *South Carolina Electric & Gas Co.* v. *Flemming,* 351 U. S. 901 (1956). Cf. also 28 U. S. C. A. § 1257.

Finally, petitioners will not be seriously inconvenienced should this Court discretionarily defer consideration of a petition for a writ of certiorari in this case until *all* constitutional questions involved have reached a definitive stop. The Delegate to Congress election with which many of petitioners' constitutional challenges are concerned (see Argument II, herein) took place on March 23, 1971. Petitioner Hobson, after obtaining the requisite number of voter signatures and paying the filing fee pursuant to P. L. 91-405, § 203(j), (l), participated in that election as the D. C. Statehood Party's candidate. Because he polled in excess of 7500 votes, the Statehood Party, pursuant to P. L. 91-405, § 203(h), is eligible to conduct a political primary in connection with the 1972 delegate election. Compare *Golden* v. *Zwickler,* 394 U. S. 103 (1969), with *Moore* v. *Ogilvie,* 394 U. S. 814 (1969).

Respondents submit that the totality of these factors amply justifies a refusal by this Court to grant the petition for a writ of certiorari.

II

Petitioners fail to present questions of sufficient importance to warrant the invocation of this Court's certiorari jurisdiction.

A

District of Columbia residents are not constitutionally entitled to a representative in Congress with full voting privileges.

On the basis of controlling decisions of this Court (hereinafter discussed), the Circuit Court of Appeals rejected as wholly insubstantial petitioners' claim that the Delegate Act unconstitutionally denies them the right to a representative in Congress with all the powers of the representatives from the several states, including the right to vote. In requesting this Court to invoke its ceritiorari jurisdiction to review such a ruling, petitioners overlook the important circumstance that the District's representation in Congress does not derive from Article I, Section 2 of the Constitution which vests legislative power in the representatives of the several states (cf. petition at 9-10).[1] Instead, any political right enjoyed by local residents stems from Article I, Section 8, Clause 17, which provides in pertinent part that:

> "Congress shall have Power * * * *To exercise exclusive Legislation in all Cases whatsoever, over such District* (not exceeding ten Miles Square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *." (Emphasis added.)

This Court has construed Article I, Section 8, Clause 17, to mean that, with respect to the District, Congress possesses the combined powers of both a general and a local government, and that such powers are plenary and unqualified. *O'Donoghue* v. *United States,* 289 U. S. 516

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[1] The existence of a non-voting delegate in Congress is by no means a novelty, as this kind of limited congressional representation has been in existence for many years. See *In re Lane,* 133 U. S. 433, 447 (1870); *Kopel* v. *Bingham,* 211 U. S. 468, 475-476 (1909).

(1933); *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427 (1932).

In *Kendall* v. *United States,* 37 U. S. (12 Pet.) 524, 619 (1838), this Court stated that "Congress has the entire control over the district, for every purpose of government * * *." Later, in *Shoemaker* v. *United States,* 147 U. S. 282, 300 (1893), this Court noted that Congress has " * * * full and unlimited jurisdiction, both of a political and municipal nature, over the District of Columbia * * *."

In *Loughborough* v. *Blake,* 18 U. S. (5 Wheat.) 317, 324 (1820), which involved the imposition by Congress of a tax on District residents notwithstanding their lack of representation in Congress, this Court, through Chief Justice Marshall, stated that persons choosing to reside in the District of Columbia have "voluntarily relinquished the right of representation, and * * * adopted the whole body of congress for * * * [their] legitimate government * * *." The taxation without representation principle was reaffirmed in *Heald* v. *District of Columbia,* 259 U. S. 114, 124 (1922), and recently reapplied in *Breakfield* v. *District of Columbia,* —— U. S. App. D. C. ——, —— F. 2d —— (No. 23, 456, decided August 7, 1970), cert. denied No. 940, February 22, 1971. It is inconceivable that such an unbroken line of decisions would have emerged without an express judicial recognition that District residents were constitutionally entitled to voting representation in Congress if, in fact, they have such a right.

Moreover, as is clear from the Constitution itself, an amendment of that instrument was required (i.e., Amendment 23) to permit District residents to vote in presidential elections. While the Report of the Senate District Committee on the Delegate Act expresses the desirability of a similar constitutional amendment in order to accord District residents congressional voting representation, Congress, in the meantime, has chosen to exercise its legislative power over the District to permit a non-voting delegate to

maintain continuing contact with it so that the needs of local residents may be better satisfied. Senate Report No. 91-1122, 90th Cong., 2nd Sess., at 2 and 3. Any attempt by Congress, in the absence of a constitutional amendment, to confer upon such a delegate the right to vote on national and local matters, would manifestly constitute a constitutionally impermissible delegation of legislative power. See *Schecter Poultry Corp.* v. *United States,* 295 U.S. 495, 529 (1935).

Petitioners' contention that the Board must conduct a referendum for the benefit of all local residents on the question of statehood for the District is based on their belief that Article IV, Section 3, of the Constitution (rather than a statute) requires such a referendum (petition at 21). As already pointed out, however, the controlling constitutional provision in this case is Article I, Section 8, Clause 17, which vests in Congress exclusive legislative power over the District of Columbia. It may well be that "two-thirds of both Houses" of Congress may "deem it necessary" to propose an amendment to the Constitution on the question of statehood pursuant to Article V of the Constitution and conceivably then authorize the Board to conduct a local referendum on the question of statehood. But plainly the Constitution, as presently written, does not compel the Board to do so.

B

The provisions of the Election Act do not unconstitutionally discriminate in favor of candidates of major political parties.

Petitioners also request this Court to review the question of whether certain provisions of the Election Act amount to unjust discriminations in favor of candidates of major political parties who seek the office of Delegate to Congress. They assert that the Election Act discriminates against entities such as the D. C. Statehood Party in limiting the right to conduct primary elections for the office of delegate

to parties obtaining at least 7500 votes in the preceding delegate or presidential election. P. L. 91-405, § 203(h). They go on to characterize as an unconstitutional discrimination the Election Act's requirement that an independent candidate for the office of delegate furnish signatures of 2% of the registered voters (5000 signatures) in order to run in the general election, whereas a candidate for a major party need only furnish 2000 signatures from party members in order to enter that party's primary. P. L. 91-405, §§ 203(i), (j) and (l). In this regard, petitioners rely on *Williams* v. *Rhodes*, 393 U. S. 28 (1968).

Williams involved a challenge to Ohio election laws which, in the language of this Court, made it "virtually impossible" for a third party to obtain a position on the presidential ballot. (393 U.S. at 24 and 25.) The applicable statute required such a party to submit a petition signed by 15% of those persons voting in the last preceding gubernatorial election, and went on to impose numerous other onerous requirements in the event that the requisite number of signatures was obtained. See concurring opinion of Mr. Justice Douglas, 393 U.S. at 36-37. As this Court made clear, the 15% signature requirement, standing alone, did not constitute an invidious discrimination, but combined with various other discriminatory features to do so. This Court thus observed (393 U.S. at 34) that:

> " * * * [*T*]*he totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights* which we hold is an invidious discrimination, in violation of the Equal Protection Clause." (Emphasis added.)

Cf. concurring opinion of Mr. Justice Douglas, id. at 39; dissenting opinion of Mr. Justice Stewart, id. at 55; and dissenting opinion of Mr. Justice White, id. at 62. This Court also stated that "minor" differences in the application of election laws to different groups are constitutionally

permissible, and that, in the absence of a statutory scheme setting forth a severe combination of restrictions on new party candidates, a legislative body has "broad powers to regulate voting, which may include laws relating to the qualification and functions of electors." Id. at 34. Specifically, this Court recognized that "the State does have an interest in attempting to see that the election winner be the choice of the majority of its voters" (Id. at 32), and that "the existence of multitudinous fragmentary groups might justify some regulatory control" (Id. at 33).

Against this background, respondents submit that the instant case unmistakably involves nothing more than "minor" differences in the application of election laws to different groups. The case, thus viewed, provides no logical basis for granting the petition on the basis of *Williams* v. *Rhodes*. See *Lyons* v. *Davoren*, 402 F. 2d 890 (1st Cir., 1968), cert. denied, 393 U. S. 1081 (1969).

C

The Hatch Act creates no discriminatory advantage in favor of candidates of major political parties for the office of Delegate to Congress.

The circumstance that at least half of the local working population is governmentally employed and thus precluded by the Hatch Act (5 U. S. C. A. §§ 7321 through 7327) from circulating nominating petitions and soliciting voter signatures does not give rise to a "discrimination" peculiarly applicable to the governmentally employed members of major parties to the exclusion of similarly situated members of other parties for the purpose of application of the doctrine of *Williams* v. *Rhodes*. Instead, the Hatch Act's campaign activity prohibitions apply across the board to all governmentally employed individuals irrespective of party and, as such, work no discriminatory advantage to one political party with a corresponding detriment to another. Conse-

quently, the Hatch Act restrictions of which petitioners complain create at best a kind of "accidential inequality", consistently held not to constitute a denial of equal protection. See *First National Bank* v. *Albright*, 208 U.S. 548, 552 (1908); *Phelps* v. *Board of Education*, 300 U.S. 319, 324 (1937); *Great Atlantic and Pacific Tea Co.* v. *Grosjean*, 301 U.S. 412, 424 (1937); *Martin* v. *Walton*, 368 U.S. 25 (1961). This circumstance hardly creates the type of substantial question customarily reviewed by this Court through certiorari.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1494

JULIUS W. HOBSON, ET AL., PETITIONERS

v.

BOARD OF ELECTIONS FOR THE DISTRICT OF COLUMBIA, CIVIL SERVICE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS CIVIL SERVICE COMMISSION AND ITS MEMBERS IN OPPOSITION

OPINIONS BELOW

The district court did not render an opinion. The *per curiam* opinion of the court of appeals (Pet. App. A-1) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1971. The petition for a writ of certiorari was filed on March 20, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Hatch Act, 5 U.S.C. (Supp. V) 7324-7327, is constitutional insofar as it prevents federal and

District of Columbia Government employees from actively participating in the campaign for the office of delegate to the House of Representatives from the District of Columbia.

STATEMENT

This case involves a broad-ranging challenge to the constitutionality of certain aspects of the District of Columbia Delegate Act, P.L. 91-405, 84 Stat. 848, which was enacted September 22, 1970. Petitioners include, among others, a candidate for Delegate to the House of Representatives from the District of Columbia and federal employees from the District (Pet. 6-7). The only claim that concerns the federal respondents (the Civil Service Commission and its members) relates to the effect of the Hatch Act, 5 U.S.C. (Supp. V) 7324-7327, upon the Delegate election.

Petitioners claim that the Hatch Act violates the First Fifth, Ninth and Tenth Amendments to the Constitution. Petitioners also contend that the Act unconstitutionally deprives them of the equal protection of the laws by reducing the pool of possible campaign workers for petitioners' D.C. Statehood Party, thereby rendering it more difficult to gather signatures necessary to comply with the District of Columbia Election Law.

The district court denied petitioners' motion for the convening of a three-judge court and dismissed the complaint. As far as is relevant here, the court of ap-

peals affirmed on the ground that the questions presented were insubstantial (Pet. App. A1-A2).[1]

ARGUMENT

1. Petitioners' challenge to the constitutionality of the Hatch Act is controlled by this Court's decisions rejecting similar challenges. *United Public Workers* v. *Mitchell,* 330 U.S. 75; *Oklahoma* v. *Civil Service Commission,* 330 U.S. 127.[2]

In *Mitchell,* a federal employee challenged on First, Fifth, Ninth and Tenth Amendment grounds the constitutionality of the provision in the Hatch Act, 5 U.S.C. (Supp. V) 7324(a)(2), which prohibits an officer or employee in the executive branch of the federal government from "taking an 'active part in political management or in political campaigns.' " 330 U.S. at 94, 95. Rejecting the constitutional attack, this Court concluded that the Hatch Act constituted a valid exercise of government authority to control actions that "in the judgment of Congress menace the integrity and the competency of the [civil] service," *id.* at 103. As the Court pointed out, Congress had determined that government employees who were active in partisan

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[1] The court vacated that portion of the judgment relating to the "party qualifying provisions for the Presidential election contained in Section 8(f) of the District of Columbia Election Act" and remanded for a hearing on the ripeness of the constitutional issues raised (Pet. App. A2).

[2] See also *Fishkin* v. *Civil Service Commission,* 309 F. Supp. 40 (N.D. Cal.), appeal dismissed, 396 U.S. 278; *Kearney* v. *Macy,* 409 F. 2d 847 (C.A. 9), certiorari denied, 397 U.S. 943.

politics constituted a "danger to the [civil] service in that political rather than official effort may * * * be channeled through political connections," *id.* at 98. Aware of earlier periods in our history when there was little if any delineation between government employment and partisan politics, this Court further noted that Congress could have properly found that "government employees are handy elements for leaders in political policy to use in building a political machine," *id.* at 101. Finally, this Court emphasized the limited scope of the Act, explaining that it was "only partisan political activity that [has been] interdicted," *id.* at 100.

2. Subsequent decisions of this Court concerning First Amendment rights do not vitiate the holding in *Mitchell.* The constitutional principle that "laws which restrict the liberties guaranteed by the First Amendment should be narrowly drawn to meet the evil aimed at" was firmly established at the time of the *Mitchell* decision, *id.* at 110. After full consideration, the Act was upheld as sufficiently precise and narrowly drawn to withstand attack on this ground. Even in this constitutionally sensitive area, Congress is not restricted to enacting laws that would require cumbersome and perhaps ineffective case-by-case administration, but may utilize realistic legislative classifications adequate to eliminate the potential for evil with which it is legitimately concerned. The danger of politicization of the federal civil service exists no less today than in 1947.

3. Petitioners also argue that the Hatch Act, in combination with the signature requirements of the District of Columbia Election Act for nominating petitions,

gives rise to the kind of invidious discrimination in favor of established party candidates condemned by this Court in *Williams* v. *Rhodes,* 393 U.S. 23. That case prohibits withholding from new party candidates advantages enjoyed by candidates of established parties. The Hatch Act creates no such distinction. The Act's restrictions apply uniformly to all government employees covered, regardless of party affiliation. Whatever practical inequalities may exist between new and established political parties in the District of Columbia they result from factors other than the Hatch Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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